

**ENVIRONMENTAL PROTECTION
ENFORCEMENT
Air Administrative Procedures and Penalties**

**Proposed Readoption
with Amendments:**

N.J.A.C 7:27A

Authorized By:

**Robert C. Shinn, Jr., Commissioner,
Department of Environmental Protection**

Authority:

**N.J.S.A. 13:1D-1 et seq.
and 26:2C-1 et seq., particularly
26:2C-8 and 26:2C-19**

DEP Docket Number:

19-99-08-704

Proposal Number:

PRN 1999-

Submit written comments by October 7, 1999 to:

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Attention: DEP Docket No. 19-99-08-704
Department of Environmental Protection
Office of Legal Affairs
PO 402
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The proposed amendments will become operative 60 days after adoption by the Commissioner (see N.J.S.A. 26:2C-8).

The agency proposal follows:

Summary

Pursuant to Executive Order No. 66(1978), the Air Administrative Procedures and Penalties rules, N.J.A.C. 7:27A, are scheduled to expire on December 2, 1999. The New Jersey Department of Environmental Protection (Department) has reviewed these rules and determined them to be necessary, reasonable and proper for the purposes for which they were originally promulgated and proposes to readopt the chapter with amendments to N.J.A.C. 7:27A-3.5 and 3.10 that will correct current inaccuracies in the cross-references. The readoption of N.J.A.C. 7:27A is necessary to ensure continued enforcement of the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq. and the federal Clean Air Act, 42 U.S.C. 7401 et seq.

The summary describes the substantive provisions of each section in N.J.A.C. 7:27A proposed for readoption.

Section Summary

N.J.A.C. 7:27A-1 and 2 are reserved. N.J.A.C. 7:27A-3 contains procedural rules for the assessment, payment, and appeal of civil administrative penalties, as well as rules setting forth the penalties for specific air pollution control violations.

N.J.A.C. 7:27A-3.1 describes the scope and purpose of subchapter 3. N.J.A.C. 7:27A-3.2 defines terms used throughout the subchapter. N.J.A.C. 7:27A-3.3 describes the Department's process for assessing penalties for violations of the Air Pollution Control Act and identifies when payment of a penalty is due.

N.J.A.C. 7:27A-3.4 sets forth the procedures for requesting and conducting an adjudicatory hearing to contest an administrative order and/or a notice of civil administrative penalty assessment.

N.J.A.C. 7:27A-3.5 identifies in general terms how the Department determines civil administrative penalties for air pollution violations and sets forth the range and limit of such penalties. This section also sets forth the factors that the Department may consider in determining the penalties for air pollution violations.

N.J.A.C. 7:27A-3.6 establishes civil administrative penalties for submitting inaccurate or false information in any application, registration, record or other document that is required to be maintained or submitted under the air pollution control program rules.

N.J.A.C. 7:27A-3.7 establishes civil administrative penalties for failure to allow lawful entry and inspection. N.J.A.C. 7:27A-3.8 establishes civil administrative penalties for failure to pay a fee when due.

N.J.A.C. 7:27A-3.9 establishes civil administrative penalties for the failure to submit or the failure to maintain records of any smoke, emission or stack data, or any test data, or any other records or information required by the Department.

N.J.A.C. 7:27-3.10 establishes civil administrative penalties for violations of rules adopted under the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., identifies, by subchapter and provision of N.J.A.C. 7:27, the civil administrative penalty amount that the Department may assess for each offense. Penalty amounts depend on the frequency of the offense; in some cases, the amount of actual emissions; the percent exceedance of the allowable emissions; the type of source; and the nature of air contaminant emitted. N.J.A.C 7:27A-3.10 also establishes the Department's authority to revoke the violator's certificate to operate or variance.

The Department has amended N.J.A.C. 7:27A-3.5(g) and (h) and 7:27A-3.10 to clarify certain inconsistencies involving cross-references. In 1994, the Department

adopted its continuous monitoring systems (CMS) penalty provisions at N.J.A.C. 7:27A-3.10(m). (See 25 N.J.R. 4045(a) and 26 N.J.R. 4030(a).) Then, in 1996, the Department adopted new language at N.J.A.C. 7:27A-3.10(i) and recodified the then existing N.J.A.C. 7:27A-3.10(i) through (k) as N.J.A.C. 7:27A-3.10(j) through (l). New language was also adopted at N.J.A.C. 7:27A-3.10(m). The existing provisions, at N.J.A.C. 7:27A-3.10(m) through (o) were recodified without change as N.J.A.C. 7:27A-3.10(n) through (p). When the rule amendment was adopted, the department failed to change the specific references within the rule so that they accurately refer to the recodified provisions. (See 28 N.J.R. 1147(b) and 28 N.J.R. 3414(a).) The changes proposed as part of this readoption with amendments will correct these erroneous cross-references.

N.J.A.C. 7:27A-3.11 establishes the maximum civil administrative penalties for failure to notify the Department of releases of air contaminants in violation of N.J.S.A. 26:2C-19(e).

N.J.A.C. 7:27A-3.12 provides that the Department may assess a penalty equal to the economic benefit which the violator has realized as a result of not complying with or by delaying compliance with the requirements of the New Jersey Air Pollution Control Act, or any rule, administrative order, operating certificate or permit issued thereunder. This economic benefit penalty assessment may be levied in addition to the civil administrative penalty levied for the violation, subject to specified limits.

Social Impact

The proposed readoption with amendments of N.J.A.C. 7:27A will have a positive social impact because it will continue to encourage compliance and discourage noncompliance with the State's air pollution control laws and regulations and the Federal Clean Air Act requirements. Failure to readopt these penalty rules would result in a State air pollution control program with no regulatory enforcement mechanism.

The general public health will benefit from the continued improvement in air quality which will result when facilities comply with emission standards and other permit requirements. Readoption of this chapter will help ensure that ground level ozone is controlled through lower emissions of volatile organic compounds and oxides of nitrogen, both ozone precursors.

The readoption with amendments will also enable the Department to comply with Federal Clean Air Act regulations, which require states to have air pollution control programs with an adequate enforcement mechanism. Failure to meet minimum Federal requirements may result in costly sanctions, including some cessation of Federal highway funding in New Jersey. By continuing to encourage compliance with the Department's air pollution control program, the readoption will also enable the Department to meet Federally mandated emission reduction commitments set forth in the existing New Jersey Implementation Plan. Again, failure to meet such requirements would result in Federal sanctions with significant negative impacts on the State.

Economic Impact

The proposed readoption with amendments of N.J.A.C. 7:27A will have no economic impact on persons who comply with the air pollution control rules. For violators, the economic impact of the readoption with amendments will vary according to the severity of the air pollution exceedance or other violation. Penalty amounts contained in this proposed re-adoption with amendments are the same as those currently in place.

If an effective compliance program is not maintained, air quality improvements required under the Federal Clean Air Act will not be achieved. This could trigger additional regulatory programs to meet air quality standards that would likely have significant and costly impacts on the public as well as the regulated community. Additionally, as set forth in the Social Impact Statement, above, failure to meet minimum Federal requirements may result in costly sanctions, including some cessation of Federal highway funding in New Jersey. A reduction in Federal highway funding in this state could, in turn, result in a financial impact upon the people of the State.

Federal Standards Analysis

P.L. 1995, c. 65, and Executive Order No. 27 (1994) require State agencies which adopt, readopt, or amend any rule or regulation, to provide a comparison with Federal law, and to provide further discussion and analysis (including cost-benefit analysis) if the standards or requirements imposed by the agency exceed standards or requirements imposed by Federal law.

Pursuant to the Federal Clean Air Act, the United States Environmental Protection is authorized to issue administrative orders assessing penalties for violations of the state implementation plans of Title I (smog), II (motor vehicles), III (toxic pollution) IV (acid rain), V (permits) and VI (stratospheric ozone protection) of that law or whenever any person attempts to construct, modify or operate a major stationary source in an area that is not in compliance with the new source provisions. These penalties can be assessed in an amount up to \$25,000 per day per violation. The total for such penalties is limited to \$200,000 in any particular case unless the USEPA administrator and the Attorney General jointly determine that a total penalty amount of greater than \$200,000 or a period of violation greater than one year is appropriate.

Pursuant to the provisions (42 U.S.C. 7410) of the Federal Clean Air Act, each State is required, within 3 years after the promulgation (or revision) of a national primary or secondary ambient air quality standard, a plan which provides for the implementation, maintenance and enforcement of such standards in each air quality region. The purpose of the SIP is to have the states bring non-compliant areas into compliance with ambient air quality levels to protect the public health and welfare. The enforcement provisions contained in N.J.A.C. 7:27A were promulgated and are proposed

here for readoption with amendments in order to comply with the State Implementation Plan requirements of the Clean Air Act as well as to provide an enforcement mechanism for the implementation of the State Air Pollution Control Program.

Penalties established and assessed by the Department pursuant to this chapter are in accordance with the State Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., specifically 26:2C-19. Pursuant to State law, penalties may be assessed in an amount not more than \$10,000 for a first violation, not more than \$25,000 for a second violation and not more than \$50,000 for the third and subsequent violations. If the violation is of a continuing nature, each day during which the violation continues or each day in which the violation is not paid in full, constitutes an additional, separate and distinct offense. See N.J.S.A. 26:2C-19d. Consequently, where a violation has occurred, a violator may be liable for a penalty as set forth by State law and it is possible that such a penalty may potentially exceed that which would be assessed by USEPA.

The Department believes that the penalties are necessary and reasonable in order to implement the SIP as provided by federal law and to implement its air pollution control program generally. It is submitted that the federal penalty structure is intended to be more general in nature and is not designed necessarily to fully address the various conditions that may exist in each state or region within the nation. The Federal regulatory scheme recognizes this and provides that the SIP requirements established by federal law are minimum requirements; a SIP may be more stringent than federal law. The State of New Jersey, which is densely populated and highly industrialized continues to have to deal with issues of non-compliance with certain National Ambient Air Quality Standards. Readoption of the current penalty structure will continue to encourage compliance and discourage noncompliance with the State's air pollution control law and regulations and the Federal Clean Air Act requirements, including the State's federally mandated emission reduction commitments set forth in the existing SIP.

The law is specific in providing for three ranges of penalties. The Department believes that the law provides for penalties of "up to" \$10,000, 25,000 and 50,000 for first, second and subsequent violations, so that it could develop a graduated penalty system with each penalty is reasonably calculated to provide a meaningful deterrent. Working within the requirements of its enabling legislation, the Department has developed penalties which are consistent with the statutory requirements and which are comparable to each violation or type of violation. Penalties have been established by the Department based not only upon the frequency of the offense, but also upon the nature of the violations and the nature and extent of the environmental harm likely to result from the type of violation. In some cases, the established penalty is as low as \$100; in others, because of the nature of the violation and possible risk to health and property, the need for deterrent required that the amount be equal to the statutory limit.

The Department may also adjust a penalty in accordance with the following factors:

1. The compliance history of the violator;

2. The number of times and the frequency with which the violation has occurred;
 3. The severity of the violation;
 4. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which a penalty has been assessed;
 5. The nature, timing and effectiveness of any measures taken to prevent future similar violation, and the extent to which such measures are in addition to those required under an applicable state statute or rule;
 6. Any other mitigating, extenuating or aggravating circumstances.
- (See N.J.A.C. 7:27A-3.5(d) and (e).)

The Department also may treat certain violations as first violations (for which a lower penalty may apply) under certain circumstances. See N.J.A.C. 7:27A-3.5(f), (g) and (h).

It should also be noted that no violator will be subject to both state and Federal penalty liability for the same violation.

Jobs Impact

The proposed new rule will not have either a positive or negative impact upon jobs within the State. No facility will incur any costs unless it commits a violation that results in a penalty assessment.

Agriculture Industry Impact

In accordance with P.L. 1998, c. 48, an act amending the Right to Farm Act, the Department has reviewed this rule proposal and has determined that it will have little or no impact upon the Agriculture Industry. The rule will have no effect upon any person unless there is a violation of any standard for which these rules establish penalties. Upon review of the proposal and the standards and requirements for which penalties are established by this chapter, the Department has determined that the only agriculturally related activity which may come under the purview of any such standards are those applicable to open burning. (See N.J.A.C. 7:27-2). Therefore anyone engaged in an agricultural activity who has obtained an open burning permit may incur penalty liability if he or she violates the terms and conditions of that permit.

Environmental Impact

The proposed readoption with amendments of N.J.A.C. 7:27A will have a positive environmental impact because the rules set up a strong deterrent to violating State

air emission standards and other air pollution control permit requirements. The continued control of air pollution will protect the environment and the health, welfare, and the property of New Jersey citizens.

As stated above, failure to readopt these penalty rules would result in a State air pollution control program with no regulatory enforcement mechanism and no meaningful way to address and prevent violations of air pollution control standards.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments impose no reporting or recordkeeping requirements. Small businesses, as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., if determined to be in violation of N.J.A.C. 7:27 will incur the penalties established under these rules. The information submission requirements and deadline for requesting an adjudicatory hearing to contest a penalty apply to all noticed for violations. Requesters will incur the administrative costs of preparing and submitting the request, and may employ legal representation. Lower penalties may be assessed for certain violations at sources with lower allowable emission limits. Sources operated by small business generally have lower allowable emission limits, thereby reducing the financial impact on small businesses due to penalties. Lesser requirements or exceptions are not provided upon business size to ensure a fair, efficient and effective penalty scheme.

Full text of the proposed readoption may be found in the New Jersey Administrative Code at N.J.A.C. 7:27A.

Full text of the proposed amendments follows (addition indicated in boldface thus; deletions indicated in brackets [thus]):

7:27A-3.5 Civil administrative penalty determination-general

- (a) – (f) (No change.)
- (g) For violations of N.J.A.C. 7:27-8.3(e) and N.J.A.C. 7:27-22.3(c) or (e) indicated by a continuous monitoring system, the Department shall calculate penalties in accordance with N.J.A.C. [7:27A-3.10(m)1] **7:27A-3.10(n)1** and may, in its discretion for purposes of determining the statutory maximum penalty for an offense, treat an offense as a first offense for civil administrative penalty determination purposes, at the beginning of each calendar quarter.
- (h) For violations of N.J.A.C. 7:27-8.3(e) and N.J.A.C. 7:27-22.3(d) or (e) when a continuous monitoring system operates out of control or is out of service, the Department shall calculate penalties in accordance with N.J.A.C. [7:27A-3.10(m)2] **7:27A-3.10(n)2** and may, in its discretion, treat an offense as a

first offense for civil administrative penalty determination purposes, if the violator has not committed the same offense in the four consecutive calendar quarters immediately preceding the first day of the calendar quarter during which the pending offense was committed.

7:27A-3.10 Civil administrative penalties for violation of rules adopted pursuant to the Act

- (a) The Department may assess a civil administrative penalty of not more than \$10,000 for the first offense, not more than \$25,000 for the second offense, and not more than \$50,000 for the third and each subsequent offense for each violation of the Act or of any rule promulgated pursuant to the Act listed in [(l)] **(m)** and [(m)] **(n)** below.
- (b) – (d) (No change.)
- (e) For violations of N.J.A.C. 7:27-8.3(e) and N.J.A.C. 7:27-22.3(c) or (e) indicated by a continuous monitoring system, the Department shall calculate penalties in accordance with [(m)1] **(n)1** below and may, in its discretion for purposes of determining the statutory maximum penalty for an offense, treat an offense as a first offense for civil administrative penalty determination purposes, at the beginning of each calendar quarter.
- (f) For violations of N.J.A.C. 7:27-8.3(e) and N.J.A.C. 7:27-22.3(d) or (e) when a continuous monitoring system operates out of control or is out of service, the Department shall calculate penalties in accordance with [(m)2] **(n)2** below and may, in its discretion, treat an offense as a first offense for civil administrative penalty determination purposes, if the violator has not committed the same offense in the four consecutive calendar quarters immediately preceding the first day of the calendar quarter during which the pending offense was committed.
- (g) – (j) (No change.)
- (k) For violations of N.J.A.C. 7:27-22.3(a) and (b), the Department shall calculate penalties in accordance with the Civil Administrative Penalty Schedule in [(l)] **(m)** below by adding the penalty amounts for each source operation within a facility that is subject to N.J.A.C. 7:27-22. The daily penalty for such violations shall not exceed the amounts set forth in (a) above.
- (l) Footnotes 3, 4, and 8 set forth in the Civil Administrative Penalty Schedule in [(l)] **(m)** below are intended solely to put violators on notice that in addition to assessing a civil administrative penalty, the Department may also revoke the violator's Operating Permit, Certificate or variance. These footnotes are not intended to limit the Department's discretion in determining whether or not to revoke an Operating Permit, Certificate or variance, but merely to

indicate the situation in which the Department would be most likely to seek revocation.

- (m) The violations of N.J.A.C. 7:27 and the civil administrative penalty amounts for each violation are as set forth in the following Civil Administrative Penalty Schedule. The numbers of the following subsections correspond to the numbers of the corresponding subchapter in N.J.A.C. 7:27. The rule summaries for the requirements set forth in the Civil Administrative Penalty Schedule in this subsection are provided for informational purposes only and have no legal effect.

CIVIL ADMINISTRATIVE PENALTY SCHEDULE

1. – 7. (No change.)

8. The violations of N.J.A.C. 7:27-8, Permits and Certificates, and the civil administrative penalty amounts for each violation, per source, are as set forth in the following table:

...

Citation	Rule Summary	First Offense	Second Offense	Third Offense	Fourth and Each Subsequent Offense
N.J.A.C. [7:27-8.3(e)1] 7:27-8.3(e)	Emissions Detected by Stack Tests from Source Operation				
N.J.A.C. 7:27-8.3(e)	Preconstruction Permit and Certificate Conditions and Provisions (no change)				
N.J.A.C. 7:27-8.3(e)	Preconstruction Permit and Certificate Conditions and Provisions Detected by Continuous Monitoring System				

...

...

See N.J.A.C. [7:27A-3.10(m)] **7:27A-3.10(n)** for the calculations of civil administrative penalties.⁵

...

9. – 18. (No change.)

19. The violations of N.J.A.C. 7:27-19, Control and Prohibition of Air Pollution from Oxides of Nitrogen, and the civil administrative penalty amounts for each violation, are as set forth in the following table:

...

N.J.A.C. 7:27-19.20(g)4 Compliance with Maximum Allowable Emission Rate

Class: Utility Boilers

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.4(a).

Class: Stationary Gas Turbines

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.5(a) or (b).

Class: Nonutility Boilers and other Indirect Heat Exchangers

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.7(b) or (c).

Class: Stationary Internal Combustion Engines

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.8(a), (b) or (c).

Class: Asphalt Plants

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.9(a).

Class: Glass Manufacturing Furnaces

See N.J.A.C. [7:27A-3.10(l)19] **7:27A-3.10(m)19**
for the calculation of civil administrative penalties
for violations of N.J.A.C. 7:27-19.10(a) or (b).

...

20. - 21. (No change.)

22. The violations of N.J.A.C. 7:27-22, Operating Permits, and civil administrative penalty amounts for each violation, per source operation, are set forth in the following tables:

...

This proposal has been filed with the Office of Administrative Law. The Office of Administrative Law will edit this proposal before publishing it in the New Jersey Register. Please refer to the September 7, 1999 New Jersey Register for the official text of the proposal.

Citation	Rule Summary	First Offense	Second Offense	Third Offense	Fourth and Each Subsequent Offense
N.J.A.C. 7:27-22.3(e)	Emissions Detected by Continuous Monitoring System				
	See N.J.A.C. [7:27A-3.10(m)] <u>7:27A-3.10(n)</u> for the calculation of civil administrative penalties. ¹⁰				
N.J.A.C. 7:27-22.3(e)	Operating Parameters Detected by Continuous Monitoring System				
	See N.J.A.C. [7:27A-3.10(m)] <u>7:27A-3.10(n)</u> for the calculation of civil administrative penalties. ¹⁰				
	...				

23. – 30. (No change.)

- (n) The Department shall determine the amount of civil administrative penalty for violations of N.J.A.C. 7:27-8 and 7:27-22 as follows: for violations detected by continuous monitoring systems in accordance with [m](n)1 below; for continuous monitoring systems not installed, out of service or out of control in accordance with [m](n)2 below; and for violations of continuous monitoring systems recordkeeping and reporting requirements in accordance with [m](n)3 below. The rule summaries for the requirements set forth in the Civil Administrative Penalty Schedule in this subsection are provided for informational purposes only and have no legal effect.
- (o) For any violation of N.J.A.C. 7:27-5.2 where the emission of air contaminants is in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life or property, the assessed penalty shall in no case be reduced by more than 95 percent of the maximum civil administrative penalty pursuant to [l](m)5 above, or shall in no case exceed the maximum civil administrative penalty set forth in N.J.S.A. 26:2C-19(b).

Based on consultation with staff, I hereby certify that the above statements, including the Comparison with Federal Law statement, addressing the requirements of Executive Order 27 (1994) and N.J.S.A. 52:14B-23, permit the public to understand accurately and plainly the purposes and expected consequences of this proposal. I hereby authorize this proposal.

August 5, 1999

/S/ ROBERT C. SHINN, JR.

Robert C. Shinn, Jr.

Commissioner, Department of Environmental Protection